CONCERNED CITIZENS FOR RESPONSIBLE MINING
(ON RECONSIDERATION)

IBLA 91-319
124 IBLA 191 (1992) Decided November 23, 1994

Petition for reconsideration of a Board decision setting aside a decision of the Malheur Resource Area Manager, Bureau of Land Management, approving a mining plan of operations. OR 46301.

Petitions for reconsideration granted; Concerned Citizens for Responsible Mining, 124 IBLA 191 (1992), vacated; BLM decision affirmed.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--Mining Claims: Environment--Mining Claims: Plan of Operations--National Environmental Policy Act of 1969: Environmental Statements

   NEPA does not require that BLM examine the environmental impacts of mine development when it approves a plan for exploration of a mineral property. Exploration and development are not connected actions as defined at 40 CFR 1508.25(a)(1). Mine development is not a reason-ably foreseeable result of exploration and need not be examined as a cumulative impact of exploration.

APPEARANCES: Brian R. Hanson, Esq., and Murray D. Feldman, Esq., Boise, Idaho, for Malheur Mining Corporation; Donald P. Lawton, Esq., Office of the Solicitor, Portland, Oregon, for the Bureau of Land Management; Gary K. Kahn, Esq., Portland, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Bureau of Land Management (BLM) and Malheur Mining Corporation (Malheur) have each filed a petition for reconsideration of our decision in Concerned Citizens for Responsible Mining, 124 IBLA 191 (1992) (Docket No. IBLA 91-319). In that decision we set aside and remanded a decision of the Malheur Resource Area Manager, BLM, dated April 15, 1991. The Area Manager's decision approved a plan of operations submitted by Malheur for exploration drilling at its Kerby Project in Malheur County, Oregon, subject to mitigating measures set forth in a March 1991 Revised Environmental

Assessment (EA). On the same date the Area Director also made a finding of no significant impact (FONSI) based on the EA. 1/

Our decision was occasioned by the April 29, 1992, Opinion and Order of United States District Judge Robert E. Jones in a related case styled Concerned Citizens for Responsible Mining v. United States Bureau of Land Management, Civ. No. 92-20-JO (D. Or.). That lawsuit was commenced by the same appellants 2/ while IBLA 91-319 was pending before us. Judge Jones granted a motion to dismiss the case before him filed by BLM on the grounds that BLM's April 15, 1991, decision was not final agency action under 5 U.S.C. § 704 (1988), and there would be no such action until we decided IBLA 91-319 or failed to act on that appeal (Opinion and Order at 10, 14).

After holding that plaintiffs met the constitutional requirements for standing, Judge Jones analyzed the requirements of 5 U.S.C. § 704 (1988). He quoted the language of section 704 that states: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Id. at 9. He continued:

> Plaintiffs claim the "agency action" which adversely affects them is the approval of the plan of operations without the proper environmental analysis required under NEPA and in violation of FLPMA. While plaintiffs have adequately pleaded that there is agency action, "the agency action in question must be final." [Lujan v. National Wildlife Federation, 110 S. Ct. 3177, 3185 (1990)]. With regard to final agency action, the applicable BLM regulations provide: "Neither the decision of the authorized officer nor the State Director shall be construed as final agency action for the purpose of judicial review of that decision." 43 CFR 3809.4(g). The decision plaintiffs are appealing is that of the "authorized officer" in deciding to approve the

1/ Malheur has been exploring for gold on unpatented lode claims within the Kerby Project since 1988 under a notice of intent. On Apr. 19 and May 8, 1990, it filed a plan of operations for exploration activities on the project. Exploration will take place over a 5-year period. Total Federal area in the plan of operations is 2,150 acres. Surface disturbance activities include up to 500 drill holes and construction of numerous drill pads. Average pad dimensions are 70 by 15 feet. Access roads to these pads are expected to be minimal. In addition to the drill holes, the project will require four trenches, approximately 100 by 15 by 10 feet in size (EA No. OR-030-90-09, March 1991, at 1-2, 6).

2/ Appellants in the appeal to us and plaintiffs in the suit in the U.S. District Court were the Concerned Citizens for Responsible Mining, the Portland Audubon Society, the Oregon Natural Desert Association, and the Oregon Natural Resources Council.

> plan of operations. Further, the BLM regulations require a person who is aggrieved by the decision of an authorized officer to utilize the administrative appeal procedures. 43 C.F.R. § 3809.4(f). While plaintiffs have taken the first step in utilizing the administrative appeals procedures (i.e. the filing of an administrative appeal), they have not awaited a decision in that appeal before pursuing a judicial remedy. Plaintiffs do not dispute the absence of final agency action, but instead argue that they should not be required to exhaust their administrative remedies. [3/]

Id. at 10.

3/ 43 CFR 3809.4(f) not only requires that a party other than an operator, e.g., appellants in this case, "shall utilize the appeals procedures in part 4 of [43 CFR]," but also provides that "[t]he filing of such an appeal shall not stop the authorized officer's decision from being effective." (Emphasis supplied.) This language means BLM's approval of Malheur's exploration plan is in effect during the time appellants' appeal is pending before us, and, indeed, BLM's Apr. 15, 1991, decision stated that explicitly.

The last sentence of 5 U.S.C. 704 (1988) provides:

"Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

(Emphasis supplied.) The language of 43 CFR 3809.4(f) emphasized above means that the decision of the authorized officer is final under 5 U.S.C. § 704 (1988), notwithstanding the assertion to the contrary in 43 CFR 3809.4(g). For that reason we referred in our decision to the discussion of section 704 in United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 439-40 (9th Cir. 1971). 124 IBLA at 193 n.2. If that reference was debatable at the time, the Supreme Court's decision in Darby v. Cisneros, 113 S. Ct. 2539 (1993), makes clear that the last sentence of section 704 means what it says and that appellants could successfully argue in Federal court that the authorized officer's Apr. 15, 1991, decision was final agency action: "[W]here the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." Darby v. Cisneros, supra at 2548 (emphasis in original).

Although a Federal court would be free to hold a BLM authorized officer's decision was final agency action, we are bound by the Department's regulations to consider appellants' appeal under the appeals procedures of 43 CFR Part 4.

Judge Jones stated that the issue of finality was to be determined in a "pragmatic way," including a consideration of "whether the case involves disputed factual issues so that a court would benefit from a fully-developed administrative record" (Opinion and Order at 11). Noting that one of the central issues in his case was whether BLM was required to analyze the cumulative impacts of gold mining and gold exploration in an environmental document prior to the approval of Malheur's exploration proposal, Judge Jones stated that a factual determination whether the possibility of gold mining was sufficiently specific to adequately analyze it at the exploration stage would be of "significant benefit" to the court. Id. at 11-12. He also stated that a "factual record detailing the intricacies of the exploration process, the gold mining process, and other allegedly connected activities in the area" would better enable the court to determine if the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1988), required as extensive an examination as appellants claimed. Id. at 12. Judge Jones observed that "the agency has already remanded the approval of this plan once, and * * * there is no indication that the agency will not do so again." Id. 4/ Further, Judge Jones stated that a pragmatic approach requires consideration of the applicable agency regulations. He noted again that 43 CFR 3809.4(g) specifically states that the decision of the authorized officer shall not be construed as final agency action for purposes of judicial review and stated that it "would be arbitrary for this court to simply disregard such an unambiguous statement." Id. at 12-13. "[U]ntil the IBLA renders a decision in the administrative appeal, or fails to act on the appeal, there is not the requisite final agency action to sue under [5 U.S.C. § 704 (1988)]," he concluded. Id. at 14. 5/

4/ This refers to our Mar. 4, 1991, order granting BLM's motion for remand of IBLA 90-529, an appeal by Western Environmental Defenders of BLM's Aug. 7, 1990, decision approving Malheur's plan of operations for exploration. BLM filed its motion in response to our Jan. 2, 1991, order to show cause why BLM's Aug. 7, 1990, decision should not be set aside as unsupported by the record because BLM's Aug. 6, 1990, EA and FONSI were based on an analysis of 100 drill holes affecting 10.5 acres, rather than the 500 drill holes affecting 15 acres that Malheur had proposed.

5/ Judge Jones added:

> "Administrative delay is not uncommon; allowing judicial intervention in an administrative proceeding every time there is a delay would clog the courts, interfere with the agency function, and promote piecemeal appeals. Only the most exceptional circumstances justify judicial interference in an ongoing administrative proceeding and plaintiffs have made no showing of circumstances warranting such interference. * * * A note of caution, however, is necessary. This court does not mean to imply that an agency can simply refuse to decide administrative appeals and escape judicial review by claiming an absence of final agency action. * * * If the IBLA refuses to make a timely decision in the administrative appeal, the plaintiffs can again request that the court use its discretion [not to require exhaustion of administrative remedies, see Morrison-Knudsen Co., Inc. v. CHG Int'l

In our decision we acknowledged the case law support for the absence of any analysis of the impacts of possible full scale mine development in BLM's revised March 1991 EA based on its assumption that an economically minable gold deposit would not be discovered by the exploration and, if it were, that a new EA would be prepared for the eventual mining plan of operations. 6/ Concerned Citizens for Responsible Mining, supra, 124 IBLA at 194. We also noted the statement in the revised EA's description of the minerals that would be impacted by Malheur's proposed exploration that

> [a]s a result of mineral exploration activities conducted by Malheur Mining and its predecessors of [sic] interest, Western Epithermal, over the past four (4) years, substantial amounts of gold-bearing and mercury-bearing rock has [sic] been discovered. Consequently, the area of the Kerby Project has a high potential for the discovery of these metals.

Id. at 194 n.3. Believing that BLM would be better equipped than we, given this "high potential," to evaluate "whether the possibility of gold mining was sufficiently specific to adequately analyze it at the exploration stage" and to provide or obtain the information Judge Jones said would be beneficial about "the intricacies of the exploration process, the gold mining process, and other allegedly connected activities in the area" -- and believing that the evaluation and information would be necessary for BLM's decision to withstand judicial review by the U.S. District Court in the likely event of a third challenge by appellants if they were not provided 7/

fn. 5 (continued)
Inc., 811 F.2d 1209, 1223, 1224 (9th Cir. 1987)]; or alternatively, plaintiffs can argue that failure to act constitutes final agency action [citing the definition of agency action in 5 U.S.C. 551(13) (1988)]."
Id. at 12-13, 16.

6/ We quoted BLM's revised March 1991 EA as stating:

"The purpose of this section [on cumulative impacts] is to analyze impacts which result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future action. Reasonably foreseeable future action does not include possible full scale mine development because approval of the proposed action does not create any additional right to development. In addition[,] there is no evidence that the proposed exploration will automatically trigger full scale mining development."

(EA at 21). The terms emphasized occur in 40 CFR 1508.7 and 1508.25(a)(1) concerning cumulative impacts and connected actions, discussed below.

7/ In response to our Mar. 4, 1991, order granting BLM's request for remand, Concerned Citizens for Responsible Mining, the Portland Audubon Society, the Oregon Natural Desert Association, and the Committee for Idaho's High Desert filed a stipulation for dismissal of their first suit in U.S. District Court against the approval of this exploration plan, Concerned Citizens for Responsible Mining v. United States Bureau of Land Management, Civil No. 90-897-MA (D. Or.), which the court dismissed on Mar. 26, 1991.

-- we stated it was both permissible and under some circumstances advisable for BLM to include the impacts of potential mining in an EA of an exploration proposal, and we set aside BLM's decision and remanded the matter so that it could supplement its EA.

Instead, BLM petitioned for reconsideration, stating that it urged "careful consideration of its Petition since it believes that the [Board's] Decision could establish a precedent which would unnecessarily restrict mineral exploration and significantly add to the cost of administering the public lands." Given the context of Judge Jones' statements quoted in the next preceding paragraph above, BLM suggests, "it is clear that the statements * * * are merely dicta":

> The BLM believes that it would not be appropriate to consider these statements as a direction from the court. This is especially so since there is no indication that the court examined the existing environmental assessment (EA) or any other part of the government's record to see whether it already provided as much of the suggested information as was reasonably possible to obtain. If the existing EA is examined it is clear that much of the suggested information is present to the degree that future actions by [Malheur] can presently be foreseen.

(BLM Request for Reconsideration at 2-3).

As to the possibility that mining will follow exploration, BLM quotes from Malheur's Answer of July 17, 1991, which states at page 6:

> Mine development will not necessarily follow Malheur Mining's proposed exploration. The very purpose of the Malheur Mining exploration is to determine whether to develop a mine. If the exploration work results in negative findings, mine development will not occur. Accordingly, it is not "irrational" or "unwise" to undertake exploration although the next phase, mine development, may never occur. [8/]

Id. at 3. If Malheur cannot predict future mining development at this stage of its exploration, BLM could do no more than speculate about a hypothetical project, BLM argues.

Mineral development and exploration are not connected actions that require consideration in the same NEPA document, BLM argues. Approval of mineral exploration is the entire agency action to be considered at this time. It would, therefore, lead nowhere for BLM to follow the suggestion of

8/ Malheur's quotations originate in Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974), and Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), discussed below.

the court to discuss whether the possibility of gold mining is sufficiently specific to adequately analyze it at the exploration stage, BLM contends. Id. at 4-5.

Finally, the existing record already contains much of the information about the "intricacies of the exploration process" and the "other allegedly connected activities in the area" Judge Jones said would be beneficial,
BLM argues. Id. at 5-6. The plans of operations filed April 19 and May 8, 1990, detail the exploration activities, and the revised EA on pages 22-25 "describes all of the other mining activity in the area and why no cumulative impact exists with the exploratory activity of Malheur Mining. It is difficult to see what else the BLM could do in this regard upon remand of the case" (Petition at 5-6).

In its petition for reconsideration, Malheur contends that we
applied an improper standard of review to determine the adequacy of BLM's
EA and FONSI rather than the standard established by Board decisions such
as Southern Utah Wilderness Alliance, 122 IBLA 334, 338 (1992). Further, Malheur states that analysis of the impacts of mine development is not required in the EA because there is no proposal for mine development and mining is neither reasonably foreseeable from nor inextricably intertwined with the approved exploration activities (Malheur's Petition for Reconsideration at 10-11). In support of this argument, Malheur filed an affidavit of Alan Glaser, president of Malheur. Relying on data compiled by Homestake Mining Company (Homestake), Glaser notes that of the 3,567 properties field-investigated by Homestake over a 7-year period, only 377 met the standards for a detailed examination. Detailed examination consists of detailed sampling, geologic mapping, and establishment of surface geochemistry and/or geophysics. Of these 377, only 125 were deemed worthy of drill testing. After drill testing, the 125 prospects were reduced to 18 properties for additional drilling and target delineation. Based on target delineation, only 12 properties of the 3,567 originally investigated had the potential to become full-scale mining operations. The Kerby Project is at the detailed examination phase (Affidavit, Dec. 10, 1992, at 3-5; Exhs. A-3, A-9).

Finally, Malheur argues that we "misconstrue[d] the holding of the district court and improperly applie[d] dictum from the court's decision to require additional analysis by the BLM" (Malheur's Petition for Reconsideration at 21).

> The language quoted by the Board from the district court decision is an abstract discussion of why a final administrative record would be helpful to the court in making a decision on the merits. At the time the court authored its opinion, there was
> no final record before the court for review because this IBLA proceeding was still pending. The court's opinion did not mean that the BLM's EA was inadequate, it simply explained why a final administrative decision was required before the court could exercise jurisdiction over the merits of the plaintiffs' claims. The

district court's decision does not foreshadow one way or the other whether the BLM's environmental assessment is sufficient to "withstand judicial review." See 124 IBLA at 194.

The court did indicate that it would forego exercising jurisdiction over the plaintiffs' claims until the IBLA had a full opportunity to exercise its administrative review role and determine the adequacy of the BLM's environmental assessment under
the appropriate NEPA standards and IBLA administrative precedents. * * *

The proper roles for the court and the Board were set out by the Ninth Circuit in Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988). * * * In a discussion echoing the policy considerations noted by the district court in Concerned Citizens, the Ninth Circuit stated that:

> Our review of Sierra Club's contentions would be assisted by a factual record. "Any party . . . aggrieved by a decision" of the BLM has the right to pursue an administrative appeal up through the Board of Land Appeals. 43 C.F.R. § 3809.4(f) (emphasis added). Under the administrative review procedure, Sierra Club can present facts which show a NEPA violation. Once this procedure is exhausted, a record for review would be established. We presently have no reason to believe judicial review is necessary. Should we not assume that the Board of Land Appeals will thoroughly review the adequacy of the EA's? If an EA is shown to be inadequate, the Board will order the appropriate remedy and Sierra Club will be granted relief without resorting to judicial review.

Id. at 1319.

In the present case, the procedure outlined in Penfold is precisely what the district court was relying on to occur. 8/ Thus, the factual record that the district court in Concerned Citizens was referring to was the record that would be developed after a review of the EA by the IBLA. The court was not expecting the BLM to further supplement the analysis.

8/ Indeed, both the federal defendant BLM and intervenor Malheur Mining cited this passage from Penfold to the court in the Concerned Citizens case.

(Malheur's Petition for Reconsideration at 22-23). 9/

9/ We have quoted the passage from the Ninth Circuit's opinion in Penfold in full.

In view of the petitioners' arguments and the information provided in the affidavit of Malheur's president, we find sufficient reason to reconsider our decision. The petitions for reconsideration are granted. 43 CFR 4.403.

[1] NEPA does not require that BLM examine the environmental impacts of mine development when it approves a plan for exploration of a mineral property. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982); Friends of the Earth v. Butz, 406 F. Supp. 742 (D. Mont. 1975); Missouri Coalition for the Environment, 124 IBLA 211 (1992); Uintah Mountain Club, 116 IBLA 269 (1990); John A. Nejedly, 80 IBLA 14 (1984).

Appellants' statement of reasons for appeal of BLM's April 15, 1991, decision does not point out deficiencies in BLM's EA or FONSI. Instead, appellants contend that an environmental impact statement (EIS) should have been prepared to analyze the impacts of both exploration and development. This is so, appellants say, because exploration and mining are connected actions and have cumulative impacts that must be analyzed in a single environmental document.

Appellants' argument lacks support on two counts. NEPA requires that an EIS be included in every agency recommendation or report of major Federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332 (1988). No argument or evidence is offered by appellants to support the proposition that exploration and development of the Kerby Project, assuming this to be the proper scope of our inquiry, meet this threshold of significance. This fact is simply asserted. As the party challenging BLM's action, the burden of demonstrating error in BLM's decision rests with appellants. United States v. Connor, 72 IBLA 254, 256 (1983). Appellants have made no attempt to carry this burden.

Appellants err in stating that exploration and development of the Kerby Project are connected actions or have cumulative impacts that must be analyzed in a single environmental document. Connected actions are defined at 40 CFR 1508.25(a)(1) "in a somewhat redundant fashion." 10/ Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). In Thomas, the court found that a logging road and subsequent timber sales were connected actions that should have been considered together in a single EIS because "[i]t is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales." Id. A "close interdependence" exists between the road and timber sales, the court found, and each was "inextricably intertwined" with the other. Id. at 758-59.

10/ This regulation states in part: "Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification."

The Thomas court found support for its position in Trout Unlimited v. Morton, supra. There the court concluded that an EIS must cover subsequent stages of development when "[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." Id. at 1285. This same principle is embodied in standards for determining when a highway may be segmented for purposes of NEPA, the court stated. Environmental impacts of a single highway may be evaluated separately from those of the rest of the highway only if the segment has "independent utility." Independent utility means utility such that the agency might reasonably consider constructing only
the segment in question. 753 F.2d at 760. Connected actions are defined
in a manner consistent with the criteria recognized in the independent utility cases. Fritiofson v. Alexander, 772 F.2d 1225, 1242 (5th Cir. 1985).

Development does not necessarily follow exploration. See John A. Nejedly, supra at 20; Affidavit of Alan Glaser at 3-4. A mining company contemplating exploration is aware of the possibility, indeed the likelihood, that exploration may not reveal a property that will reach development. If exploration is unsuccessful, the mining company will not undertake development, and this decision to forego development is entirely reasonable. The dependency that Trout Unlimited found key to connected actions is absent in this case, because it is both rational and wise
for a mining company to forego development. Moreover, this decision to
forego development underscores the independent utility of exploration.
As Thomas states, independent utility is such utility that the agency (or mining company) might reasonably consider completing only the segment in question. 11/

11/ Exploration and its intricacies, a topic mentioned by Judge Jones,
are described at some length by Glaser in his affidavit of Dec. 10, 1992. Exploration is a multi-stage process in which prospects are subjected to
an ever-increasing level of scrutiny. Initially, a mining company, using a variety of exploration techniques, determines the extent and concentration of the commodity of choice. If both concentration and extent appear in economically viable amounts, the company will enter a pre-feasibility stage where a detailed examination of costs associated with mining, metallurgical extraction, and permitting is made. This process entails additional drilling, testing of mining and extractive techniques, baseline analysis, and reserve studies under various market conditions. If each of these parameters is met in this economic analysis, the property is advanced to the final feasibility/permitting stage where the primary choice in mining and metallurgy is submitted to the various local, state, and Federal agencies for review. In the permitting stage, the agencies may reject the plan or suggest amendments. If agency amendments are economically feasible, the mining company will proceed to development of the property. Id. at 4; Exh. A-10.

Addressing exploration activities at the Kerby Project, Glaser states that the purpose of the instant exploration plan is to determine if precious metals are present in economically viable quantities to justify mining.
The plan is directed solely to exploration of approximately 15 acres within

Appellants point out that an agency's obligation to analyze cumulative impacts is distinct from its obligation to analyze connected actions. Thomas v. Peterson, 753 F.2d at 758-59. A "cumulative impact" is the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. 40 CFR 1508.7. Appellants err, however, in claiming that gold mining, i.e., development, is a reasonably foreseeable future action whose impacts must be analyzed along with those of exploration. Development does not necessarily follow exploration, John A. Nejedly, 80 IBLA at 20, nor is it reasonably foreseeable to occur.

The Glaser affidavit, set forth in part above, provides data, uncontradicted in the record, showing that development is not a reasonably foreseeable result of exploration. Of the 3,567 properties investigated by Homestake in a 7-year period, only 12 had the potential to become full-scale mining operations (Affidavit at 3-4; Exhs. A-3, A-9).

The same conclusion expressed by Glaser is reached by BLM in its Answer filed July 15, 1991, at 4:

> While miners and mining companies appear at times to be incurable optimists, the reality is that considerable exploration takes place without subsequent mineral development. Many factors may
> be involved, including the absence of mineral resource of enough concentration or volume to warrant development, engineering problems concerning removal, fluctuations in the market price of the commodity, and financial and organizational difficulties.

Our decision that development impacts need not be analyzed in BLM's assessment of Malheur's exploration plan has the added virtue of practicality. If development were to be analyzed prior to exploration, BLM
would be unable to describe with any specificity where development would occur. Lacking knowledge of the situs of development, it would be unable
to describe the nature of the deposit that might be found. Absent such data, the agency would be hard pressed to predict how such deposit might

fn. 11 (continued)
a project area of 2,150 acres of Federal land. If gold is not encountered in a form viable for economic mining, Malheur may not engage in any type of mining activities on the Kerby Project. Id. at 2.

Additional information describing the exploration process is set
forth in BLM's EA of March 1991. Malheur's exploration plan is described
at pages 2 and 5-7. Other topics include: drilling (pages 5, 9, 16, 19); trenches (pages 5, 16, 17); duration (page 6); acreage (page 6); roads (pages 6, 16, 19); and reclamation (pages 6-8, 19-20, 24). Malheur's exploration activities are described in its plan of operations, dated
May 4, 1990, at pages 2-3; a map of such operations is attached as figure 2 to the plan. An overview of the exploration plan of Malheur Mining is set forth at pages 3-5 of its petition for reconsideration, Dec. 14, 1992.

be extracted. 12/ See John A. Nejedly, supra at 27. Such an environmental analysis would be based on vague information and offer little guidance to the agency.

Appellants also argue that a programmatic EIS must be prepared analyzing the impacts of the instant project and other mining projects in the same area. Appellants refer specifically to drilling activities at Indian Head Mountain, approximately 2.5 miles from the Kerby Project; ongoing gold exploration near Malheur City, approximately 29 miles away; and gold exploration at Alkali Flats, approximately 9 miles distant.

As above, appellants make no reference to BLM's EA, but rely instead on case law to support their argument. In particular, appellants look to Fritiofson v. Alexander, supra, for the proposition that "cumulative impacts from distinct proposals pending in a given region may in certain circumstances mandate the preparation of a regional or comprehensive EIS even though a single proposal for comprehensive regional action is not pending." 772 F.2d at 1241. Appellants also cite Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976), in which the Supreme Court noted that NEPA may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time: "Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together."

Appellants' argument is unpersuasive. Appellants fail to identify the cumulative or synergistic impacts that must exist to support the requirement of a comprehensive EIS. Peshlakai v. Duncan, 476 F. Supp. 1247, 1258 (D.D.C. 1979), makes clear that a regional EIS is required in two and only two instances: (1) when there is a comprehensive Federal plan, and (2) when various Federal actions in a region have cumulative or synergistic environmental impacts on a region. See also Southwest Resource Council, 96 IBLA 105, 116-17, 94 I.D. 56, 62-63 (1987). No effort is made by appellants to describe the cumulative or synergistic impacts that the various mining actions will contribute to, and no effort is made to define the region that the EIS would address.

BLM's EA addressed each of the three mining operations identified by appellants and concluded that they would have no cumulative impacts associated with the proposed exploration activities by Malheur. In support, BLM stated:

12/ The Glaser affidavit explains that actual mining and extraction of ore can be accomplished in numerous ways. The method chosen is dependent upon the type of deposit and current economic conditions. The type of deposit and the mining method used can only be determined by exploration and subsequent design work. From the limited exploration conducted at the Kerby Project, Glaser states, the mineralization disclosed to date may be suitable for underground or open pit mining, mineral concentration by flotation gravity, fluid bed roasting, autoclaving, or leaching. Id. at 5.

> Drilling activities on Indian Head Mountain by Battle Mountain Exploration Company, located on public land in Idaho, approximately 2.5 miles from the Kerby Project area have been completed. The recontouring of the disturbed area has been completed by the company and accepted by BLM in July 1990. Reseeding was done in October 1990 and will be evaluated. There were no greater than 13 holes drilled, disturbing about two acres on the southeast exposure of Indian Head Mountain. Due to the location on the mountain of the drilling activities, Battle Mountain's activities are fully outside of the critical viewshed associated with the proposed drilling project, thus not adding any visual cumulative impacts within the critical viewshed where the proposed drilling is located, as observed by the casual observer traveling through or otherwise spending time within the area.
>
> Billiton Minerals U.S.A. Inc., has been actively exploring for gold in the Willow Creek drainage near Malheur City since 1989 under a Notice. Their drilling activities are located on public land approximately 29 air miles northwest from the Kerby Project. Three to four acres of total surface disturbance has occurred. The company has reclaimed all trenches and many drill sites for overall reclaimed acreage of approximately 3.06 acres.
>
> Several mining companies have explored for gold in the Alkali Flats area during 1989 and 1990 under Notices of Intent. The drilling activities were located on public land in the Willow Creek drainage approximately 9 air miles southwest from the Kerby Project at Farewell Bend. No new roads or drill pads were constructed; therefore, surface disturbance was minimal. There are no current Notices of Intent for drilling exploration in the Alkali Flats area.

(EA at 22-23).

BLM's analysis contributed to its April 15, 1991, FONSI. In Southern Utah Wilderness Alliance, supra, we held that a determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination that no significant impacts will occur is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Utah Chapter Sierra Club, 120 IBLA 229, 236 (1991). Having failed to identify cumulative or synergistic impacts of the mining operations above, appellants have not demonstrated error in BLM's EA.

Lastly, appellants contend that exploration will result in unnecessary environmental harm. In support, appellants note that the EA states that

air quality will be degraded; wildlife will be displaced; soil displacement, compaction, and erosion will occur; visual and auditory impacts will exist; and recreational hunting will be affected. These impacts indicate that BLM has not met its statutory mandate to protect the public lands from unnecessary degradation, appellants charge.

BLM's obligation to protect the public lands from unnecessary degradation is found at 43 U.S.C. § 1732(b) (1988): "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." "Unnecessary or undue degradation" is defined at 43 CFR 3809.0-5(k) to mean "surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations." See Red Thunder, Inc., 129 IBLA 219, 236-38, 101 I.D. 52, 62-63 (1994).

The fact that environmental harm will occur as a result of Malheur's activities does not indicate that this harm is unnecessary or undue degradation. Degradation would occur if the surface disturbance were greater than would normally occur when performed by a prudent operator, but appellants make no effort to show that Malheur would operate imprudently. The burden to demonstrate error in BLM's action rests with appellants, and appellants have again failed to carry this burden.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted; our decision in Concerned Citizens for Responsible Mining, 124 IBLA 191 (1992), is vacated; and the April 15, 1991, decision of the Malheur Resource Area Manager is affirmed.

_____
Will A. Irwin
Administrative Judge

I concur:

_____
Gail M. Frazier
Administrative Judge